Kemajuan Negeri Pahang (LKNP) offered to pay by instalments to be completed within a period of four years. There are no clear provisions either way except that the words 'each amount awarded' appearing in s 29(1) do seem to suggest a lump sum payment. My own view is that payment by instalments is permissible if both parties agree.

For the above reasons the application for a declaration as per encl 1:

(a) in terms of para 1(a) is therefore refused as I found no necessity to invoke art 13 of the Federal Constitution;
(b) in terms of para 1(b) is also refused as I find no contravention of the provisions of the Federal Constitution and therefore no damage suffered by the applicants;
(c) in terms of para 1(c) is allowed only to the extent that the applicants are entitled to the full sum of the original award of $1,606,750 with interest leviable under O 42 r 12 of the Rules of the High Court 1980 from date of judgment (17 June 1988). Also, as I find that possession has not been taken, damages asked for under s 32 do not arise; and
(d) costs to the applicants.

Order accordingly.

Solicitors: *Balendran Chong Haranay & Bodi.*

Reported by *Wong Kim Fatt*

Bank Bumiputra Malaysia Bhd v Syarikat Kejuruteraan Hong Huat Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO C23-485-86
GUNN CHIT TUAN J
22 JULY 1988

Banking – Overdraft banking facility – Security – Charge on land – Joint and several guarantee by directors – Further security in form of deed of assignment – Whether deed of assignment an absolute one or by way of charge only – Right of assignee to sue assignor's debtors – Civil Law Act 1956, s 4(3)

The plaintiff applied for summary judgment under O 14 against the first defendant and also applied for summary judgment against two other parties. Both applications were heard and dismissed by the senior assistant registrar. The plaintiff appealed to the judge.

By a loan agreement made on 11 October 1983 between the first defendant and the plaintiff, the latter agreed to grant to the first defendant an overdraft facility up to the limit of $2,800,000 for principal only upon the terms and conditions appearing in the said agreement. As security the first defendant created a charge under the National Land Code 1965 and also caused its directors to execute a joint and several guarantee. As further security for the overdraft facility the first defendant also executed two deeds of assignment in favour of the plaintiff under the terms of which it assigned to the plaintiff all the proceeds under a project undertaken by the first defendant known as Malacca Seafront Reclamation Project. However, instead of proceeding to enforce any of the securities, the plaintiff chose to issue a writ against the first defendant and four others claiming the sum of $3,710,380.68, interest and costs.

The plaintiff contended that the said deeds of assignment were not absolute and the assignee could not maintain a suit against the assignor's debtors. It also contended that the right to sue for the debt was not assigned and that only part of the debts of $12,000,000 and $15,470,000 was assigned for the overdraft facilities granted up to a sum of $2,800,000.

Held, allowing the appeal:

(1) Whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

(2) Looking at the whole of the deeds of assignment of 12 October 1983, the learned judge was of the opinion that the documents were absolute assignments and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act. The assignments were absolute in the sense that the assignor intended to transfer to the assignee 'all moneys, interests and rights now or hereafter become due and payable to the assignor'.

(3) Even if the assignments were not absolute, nevertheless, cl 7 of the deeds of assignment gave the plaintiff the right to take legal action at any time against the assignor itself for the recovery of the banking facilities or any part thereof together with interest thereon without having to enforce the securities given under the said loan agreement.

(4) The plaintiff was given liberty to sign judgment as prayed against the first, fourth and fifth defendants.

Cases referred to

1 *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd* [1984] 2 MLJ 268 (folld)
2 *The Mercantile Bank of London Ltd* v *Evans* [1899] 2 QB 613 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)

Abdul Razak bin Ibrahim for the appellant/plaintiff.
K Balaguru for the respondent/first defendant.

Cur Adv Vult

Gunn Chit Tuan J: By a summons-in-chambers dated 29 September 1986, Bank Bumiputra Malaysia Bhd (the plaintiff) applied for leave to sign final judgment against Syarikat Kejuruteraan Hong Huat Sdn Bhd (the first defendant) under O 14 of the Rules of the High Court 1980. By another similar application by way of summons-in-chambers dated 18 November 1986, the plaintiff also applied for leave to sign final judgment against one Mohd Sidi bin Maasim and Tan Wah Lye for $3,710,380.68, interest thereon at the rate of 4.5% pa above the plaintiff's base lending rate which was then 9.75% pa with

monthly rests from 1 January 1986, to date of realization and costs. Both applications were heard and dismissed by the learned senior assistant registrar on 20 January 1987.

By a loan agreement made on 11 October 1983 between the first defendant and the plaintiff, the latter agreed to grant to the first defendant an overdraft facility up to the limit of $2,800,000 for principal only upon the terms and conditions appearing in the said agreement. As security the first defendant created a charge under the National Land Code 1965 and also caused its directors to execute a joint and several guarantee. As further security for the overdraft facility the first defendant also executed two deeds of assignment in favour of the plaintiff under the terms of which it assigned to the plaintiff all the proceeds under a project undertaken by the first defendant known as Malacca Seafront Reclamation Project. However, instead of proceeding to enforce any of the securities, the plaintiff chose to issue a writ against the first defendant and four others claiming the said sum of $3,710,380.68, interest and costs.

It was the contention of Encik Abdul Razak, counsel for the plaintiff, that the said deeds of assignment were not absolute ones and the assignee could not maintain a suit against the assignor's debtors. He stated that the right to sue for the debts was not assigned and also contended that only part of the debts of $12,000,000 and $15,470,000 was assigned for the overdraft facilities granted up to a sum of $2,800,000. Counsel referred to the former Federal Court case of *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd*,[1] in which an assignment was executed in the following terms:

> That in consideration of the bank having agreed to grant the loan the assignor as beneficial owner hereby assigns absolutely to the bank all his rights title and interest in and to the said property and under the said sale agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

In that case the Federal Court held that the document concerned was an absolute assignment not purporting to be a charge only within the meaning of s 4(3) of the Civil Law Act as the instrument clearly purported and was intended in point of form to be an absolute assignment because of the use of the word 'absolutely' in cl 1 thereof.

Counsel also referred to the English Court of Appeal case of *The Mercantile Bank of London, Ltd* v *Evans*.[2] In that case an assignment dated 3 June 1897 was as follows (at p 616):

> In consideration of your (plaintiffs) placing to my (Vansittart's) credit today the sum of £200, I (Vansittart) hereby assign to you the whole of my rights and interest under the agreement dated 1 June 1897 ... as security for the repayment on demand of the said sum of £200 ... and I hereby appoint you my nominees in pursuance of the provisions of the said agreement, with power to exercise all my rights thereunder either in my name or your own, and I hereby appoint you my irrevocable attorneys in that behalf.

AL Smith LJ stated that that seemed to him to show that the right of suing on the contract remained in the assignor. Vaughan Williams LJ also agreed that the assignment although expressed to be of the whole of the assignor's rights and interest under the agreement yet it did not purport to be an absolute assignment of the contract. Encik Abdul Razak pointed out that in this case there was no clause regarding the enforcement of all remedies and contended that the assignment was therefore by way of charge only within the meaning of s 4(3) of the Civil Law Act. Finally, and in the alternative, it was the contention of Encik Abdul Razak that even if the assignment in this case was absolute, the plaintiff still had the right to sue the first defendant for the debt because of the following cl 7 in the two relevant deeds of assignment:

> It is further agreed that this deed of assignment is without prejudice to the right of the bank to take legal action at any time against the assignor for the recovery of the banking facilities or any part thereof together with interest thereon.

Mr Balaguru, counsel for the defendants, on the other hand, referred to the following passages at pp 696-697 in Vol 1 of *Chitty on Contracts*, 25th Ed:

> And an assignment of all moneys due or to become due from the debtor, which was expressed to be by way of continuing security for all moneys due from the assignor to the assignee, has been held to be absolute (*Hughes* v *Pump House Hotel Co Ltd* [1902] 2 KB 190) ... The fact that the assignment is expressed to be by way of security for a loan does not by itself prevent it from being absolute, though combined with other factors such expressions may have this effect: *The Mercantile Bank of London Ltd* v *Evans* [1899] 2 QB 613. The test seems to be, has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question as against the debtor ? If so, the assignment will be absolute; but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them, it will be held to be by way of charge only. Much may depend on the language of the particular instrument, but in construing it, the court will look at the whole of its language.

Counsel contended that the assignor in this case had given away all its rights. He agreed, however, that cl 7 in the deeds of assignment was very wide but stated that the defendant could not sue the principal debtors.

As pointed out by the Federal Court in *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd*[1] at p 270, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself. Now, in this case, the two assignments of 12 October 1983 were in the form of a deed signed by the first defendant as assignor and the plaintiff as assignee. After reciting (a) that the assignor has been awarded the Malacca Seafront Reclamation Project to the value of $12,000,000 and $15,470,000 payable by Messrs Pembinaan Bandar Melaka Sdn Bhd and Messrs Pembinaan

Kota Laksamana (Melaka) Sdn Bhd and (b) that the assignor has requested the assignee to provide banking facilities to enable the assignor to perform the said contracts and the assignee has agreed to provide banking facilities in the form of an overdraft facility up to the sum of $2,800,000 with interest at 2½% above the plaintiff's base lending rate, the first defendant duly executed the deeds of assignment providing, inter alia, as follows:

(1) In consideration of the bank advancing to the assignor the principal sum of dollars ringgit two million and eight hundred thousand only ($2,800,000) the assignor assigns to the Bank all moneys interest and right now or hereafter become due and payable to the assignor by Messrs Pembinaan Bandar Melaka Sdn Bhd (Messrs Pembinaan Kota Laksamana (Melaka) Sdn Bhd) under the said contract.

(2) In the event that no moneys or interest is received by the bank under the assignment under cl 1 above, or if the moneys actually received do not fully satisfy the principal sum with interest thereon the whole principal sum and interest or part thereof that remained unpaid shall become due and immediately repayable.

...

(4) The assignor further covenants that any receipt issued by the bank in respect of any payment made by Messrs Pembinaan Bandar Melaka Sdn Bhd (Messrs Pembinaan Kota Laksamana (Melaka) Sdn Bhd) as hereinbefore mentioned shall be a sufficient and valid discharge.

(5) In the event of the bank receiving any moneys in excess of the principal sum and the accrued interest thereon at two and a half per centum above BBMB base lending rate the bank agreed to refund after deducting all the necessary incidental expenses any such excess to the assignor forthwith or as soon as it is practicable.

After the signatures by the parties there were the following indorsements:

(1) We, Messrs Pembinaan Bandar Melaka Sdn Bhd, hereby acknowledge the existence of the assignment agreeing to credit all proceeds of the contract direct into Kejuruteraan Hong Huat Sdn Bhd's account no: 001-18846-86 with you.

Pembinaan Bandar Melaka Sdn Bhd
(Signed)

(2) We, Messrs Pembinaan Kota Laksamana (Melaka) Sdn Bhd, hereby acknowledge the existence of the assignment agreeing to credit all proceeds of the contract direct into Kejuruteraan Hong Huat Sdn Bhd's account no: 001-18846-86 with you.

Pembinaan Kota Laksamana (Melaka) Sdn Bhd
(Signed)

Looking at the whole of the deeds of assignment of 12 October 1983, it was my opinion that the documents were absolute assignments and were not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act. The assignments were absolute in the sense that the assignor intended to transfer to the assignee 'all moneys, interests and rights now or hereafter become due and payable to the assignor'. Even any receipt issued by the bank in respect of any payment would be a sufficient and valid discharge and the debtors in each case have acknowledged the existence of the assignment and agreed to credit all proceeds of the contracts direct into the first defendant's account with the plaintiff. The debtors therefore knew to whom they had to pay their debts.

However, if I was wrong in my opinion that the assignments were absolute, nevertheless, the above-quoted cl 7 of the deeds of assignment gave the plaintiff the right to take legal action at any time against the assignor itself for the recovery of the banking facilities or any part thereof together with interest thereon without having to enforce the securities given under the said loan agreement. In all the circumstances I therefore allowed the appeal against the decision of the learned senior assistant registrar and gave liberty to the plaintiff to sign judgment as prayed for against the first, fourth and fifth defendants.

Order accordingly.

Solicitors: *Razak Ibrahim & Co*; *AK Lee & Co.*

Reported by *Wong Kim Fatt*

Public Bank Bhd v Chan Tak Kow

HIGH COURT (KUANTAN) – ORIGINATING SUMMONS NO 13 OF 1983
LAMIN J
24 JUNE 1988

Civil Procedure – Foreclosure – Order on summons for directions – Application to set aside – Meaning of 'liberty to apply' clause – Reserve price – Whether market value or forced sale value – Meaning of 'subordinate court' – Rules of the High Court 1980, O 31 r 2(4)(c), O 32 r 9, O 56 r 1

Words and Phrases – 'Liberty to apply'

This is an appeal under O 56 r 1 of the Rules of the High Court 1980 against the decision of the senior assistant registrar in respect of an application by the defendant for an order that the senior assistant registrar's order dated 13 July 1986 in summons for directions be set aside. In the order the reserve price was fixed at $216,000 according to the forced sale value of the plaintiff's valuation report. The said order also contained a 'liberty to apply' clause. The appeal was essentially on two points, namely, the reserve price and the interpretation of the 'liberty to apply' clause.

Held, dismissing the appeal:

(1) Prima facie, the words 'liberty to apply' refer to the working out of the actual terms of the order. It should be confined to the problems relating to enforcing or executing the